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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 193

DAVID H. RUBINGER and
WILLIAM R. McALLISTER,
Petitioners,
v.
INTERNATIONAL TELEPHONE & TELEGRAPH
CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the District Court is reported at 193 F. Supp. 711. The opinion of the United States Court of Appeals for the Second Circuit, affirming the dismissal of the complaint after trial, is reported at 310 F. 2d 552 and printed in the appendix to the petition.*

* Page references to the opinion of the Court of Appeals appear herein as "Pet. App. . . ."

Page references to the District Court's opinion printed in petitioners' appendix to their brief in the Court of Appeals appear herein as "App. . . ."

Petitioners' and respondent's exhibits printed in the appendices to the briefs in the Court of Appeals or certified to this Court are indicated as "Pl. Ex. . . ." and "Def. Ex. . . .", respectively.

The judgment of the Court of Appeals was entered on November 27, 1962. A petition for rehearing and a further petition for rehearing addressed to the Court of Appeals in banc were both denied on January 10, 1963. A motion by petitioners for leave to file a certain table in support of the petition for rehearing was denied by the Court of Appeals on January 14, 1963. A further motion by petitioners to the Court of Appeals in banc to vacate the denial of the petition for rehearing was denied on February 20, 1963. A petition to vacate the denial of the petition for rehearing was also denied on February 20, 1963.*

Preliminary Statement

Respondent's brief is made necessary by petitioners' claim that "The theory of the Lumbard opinion is novel, revolutionary in the field of contracts, and entirely different from that of the Trial Court." (Petition, 5)

The claimed "novel" and "revolutionary" aspect of the opinion is founded upon petitioners' bald assertion that the Court of Appeals purportedly "recognized" that while petitioners' assignor had a right under the agreement between the parties to purchase respondent's merchandise, it, nevertheless, "argued that the Merchandiser had no right to sell those sets to its customers." (Petition, 5) Petitioners then assert that no clause prohibiting resale can be found within the terms of the agreement; that in any event such a clause is void; and that the Court of Appeals erred in enforcing the agreement without excising the offending provision. In essence, the entire petition is devoted to attacking the opinion of the Court of Appeals as sustaining a "total restraint on resale" void under state and federal law.

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* On the same date, the Court of Appeals entered a further order advising counsel for petitioners that a local rule assessing costs of $100 would "become relevant in the event of any further needless application."

In fact, the Court of Appeals neither made the holdings nor arguments attributed to it by petitioners, but expressly held, as did the trial court, that petitioners were merely a sales agent soliciting orders on a commission basis without any right to make substantial purchases for their own account. Therefore both Courts rejected petitioners' claim that under the agreement petitioners had the right to purchase respondent's entire inventory of merchandise at the time respondent sold its entire business. Neither the opinion of the Court of Appeals nor the opinion of the trial court permits any inference to be drawn that petitioners "had a right to make 'more substantial purchases' of [respondent's merchandise] than those needed as samples." (Petition, 5) In plain language the Court of Appeals expressly held that petitioners had no such right:

> "It is an essential premise of their theory of recovery that the agreement between Capehart and Rubinger-McAllister entitled the latter to purchase merchandise for resale; i. e., that it was not merely a sales agent, deriving its income from commissions on sales which it promoted, but it was also a distributor, purchasing for its own account and reselling at a profit . . . . we reject this premise, ..."
>
> . . . . . .
>
> "Rubinger-McAllister was a sales agent whose duty and right was to solicit orders for Capehart. Capehart had no duty to sell its products to Rubinger-McAllister for resale. This disposes of the plaintiffs' claim; having no right to purchase, Rubinger-McAllister was not legally harmed by Capehart's failure to provide an opportunity to purchase." (Pet. App., 33, 36)

Respondent respectfully submits that the opinion of the Court of Appeals cannot be construed as sustaining "a total restraint on resale" of merchandise which the

Court of Appeals and the trial court clearly held petitioners had no right to purchase.

Indeed, it appears that petitioners, for the purpose of making Chief Judge Lumbard's opinion in the Court of Appeals a *cause célèbre*, have adroitly seized upon an isolated portion therein, namely, that the agreement said "nothing about a right to resell."* (Petition, 7)

The Court of Appeals, in pointing out that the agreement carefully detailed the provisions normal to a sales agency, commented that the agreement omitted all the provisions one would expect to find if the parties had intended that petitioners were to do more than solicit orders in respondent's behalf. In this context the Court of Appeals referred to the absence of any provision giving petitioners a right to sell, merely drawing attention to that omission from the agreement as another point in support of its conclusion that petitioners were "a sales agent whose duty and right was to solicit orders for respondent" and that respondent had no duty to sell its products to petitioners' assignor except only such products as it needed for its own use, e.g., for display purposes. The Court was silent on whether petitioners could resell what they bought. That was no longer an issue.

In presenting a truncated version of the opinion, petitioners are now attempting to obscure the issue litigated in the courts below of whether they had any right whatso-

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* "Although these provisions do show that Rubinger-McAllister was expected to purchase some products from Capehart, they say nothing about a right to resell. An examination of the agreement establishes that Rubinger-McAllister was entitled to purchase only such products as it needed for its own use; e.g., for display and demonstration purposes. As the district judge said, the agreement 'merely provided for a rather usual sales agency in a limited designated territory . . .'

"Glaringly absent from the agreement are any of the provisions which one would expect to find in a contract which a manufacturer customarily makes with a distributor." (Pet. App., 34)

ever to purchase respondent's entire inventory, and of whether respondent had a duty to give petitioners first refusal on such a sale.

It is respectfully submitted that petitioners have misstated the basis of the opinion of the Court of Appeals, and consequently the petition is misleading and erroneous.

Questions Presented

The broad question is whether the Court of Appeals erred in affirming the opinion of the District Court which decided that petitioners did not possess the right to purchase respondent's entire inventory of merchandise sold together with the sale of its business to a third party, Ben Gross Corporation, and were not owed the duty of being given the same opportunity to purchase respondent's entire inventory. More specifically, the questions presented are:

1. Did the regional merchandiser's agreement construed as a whole, constitute petitioners as a "sales agent" to whom respondent owed only the duty of exercising good faith in passing on orders submitted by such sales agent, so as to enable it to earn commissions on such orders?

2. If petitioners' assignor had some right to purchase for its own account, did the parties contemplate such right would be infringed by the sale of respondent's business to Ben Gross Corporation and that respondent would have a corresponding duty to solicit and accept a similar offer from petitioners for the sale of the entire merchandise inventory?

Statement

Petitioners' sole claim in the trial court and in the Court of Appeals was that under an agreement between the par-

ties, dated March 8, 1956, respondent's division, Capehart-Farnsworth Company (C-F), was required to sell to petitioners' assignor, Rubinger-McAllister Corporation,* its entire inventory of merchandise on the same terms at which respondent agreed to sell to a third party, Ben Gross Corporation, and that by virtue of respondent's failure to do so petitioners' assignor was deprived of profits in excess of $1,000,000 which it would have made upon its purchase and resale of such merchandise. Recovery of commissions is not an issue herein.**

The agreement titled "Regional Merchandiser's Agreement," granted petitioners an exclusive sales agency in a limited designated territory to solicit for C-F, on a commission basis, orders from retail dealers for some of the home electronic appliances (phonographs, radio and television sets and components) manufactured by C-F. C-F had eighteen other such regional merchandisers operating under similar form agreements throughout other sections of the country.*** Each such sales representative was similarly assigned a territory in which it was granted the exclusive right to solicit orders in C-F's behalf from consumer-outlet dealers within its territory. Petitioners were assigned the New York area.

The agreement provided that it was to remain in force until terminated by mutual agreement or by written notice given by either party to the other, and that any such written notice would become effective ten days from the date the

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* References herein to petitioners shall be deemed to include petitioners and their assignor.

** See the opinion of the Court of Appeals, reported at 310 F. 2d 552, 557, affirming a judgment obtained by petitioners for loss of commissions. A third litigation instituted by petitioners (SDNY, Civ. No. 117-133), arising out of the same transaction giving rise to these actions and claiming an injury under the anti-trust laws, is pending and also is not an issue herein.

*** One such agreement covering the New Jersey area is Def. Ex. LL. C-F's regional merchandisers and their respective assigned territories appear in Def. Ex. BBB.

notice was given. It also granted to respondent the absolute right on termination of the agreement to repurchase from the regional merchandiser the C-F products which the regional merchandiser may have on hand and also provided that on termination the regional merchandiser could in no way use or permit use of the name "Capehart" in any business conducted by him.

Petitioner McAllister was familiar with C-F's marketing procedures. He had been employed by respondent for many years and was C-F's Eastern Divisional Sales Manager until at least March 8, 1956. Petitioner Rubinger was familiar with the home electronics business, having spent his entire career in that field.

C-F's direct selling of its line to retailers through regional sales representatives had superseded an earlier marketing arrangement carried out by area distributors or middlemen who purchased C-F products at distributor prices and in turn resold at a profit to retail dealers within their respective areas.

In contrast to a distributorship agreement the regional merchandiser was freed of the risk of ownership, including the responsibility for and the expense of warehouse maintenance and servicing the product, all of which obligations were assumed by C-F. At no point did the merchandiser take title to C-F merchandise other than to samples sold to him for display in the showroom he was required to maintain, and so in no sense could he be thought to work for profit on re-sale, but rather to receive commissions as a manufacturer's sales representative on orders he solicited in C-F's behalf.

While petitioners assert that the regional merchandiser's agreement provided that the merchandiser would function as a distributor with the right to make substantial purchases for "its own account", it is undisputed that the total orders placed by petitioners was $3,996.45, which con-

sisted in large part of display merchandise, and that no such orders were placed after April 12, 1956. The unrebutted testimony shows that at the latter time C-F advised petitioners that it would refuse to accept any order placed with it in petitioners' name because it discovered that petitioners had effected unauthorized releases of merchandise from C-F's independent warehouse and was reselling the products to retail dealers at excessive prices and pocketing the differential, the only one of C-F's nineteen regional merchandisers attempting such practice. At no point prior to or after C-F's discovery of the surreptitious practice of overcharging dealers and C-F's written protests, did petitioners attempt to justify this conduct or assert any claim of right to buy and resell merchandise, and thereafter the scheme was abandoned.

In May 1956, respondent sold its C-F division to Ben Gross Corporation which thereafter changed its name to the Capehart Corporation. The Gross interests, who had been identified with the radio-television industry since the industry's inception had wound up their relationship with Stromberg-Carlson which had abandoned its television business, and were looking for a new home electronics enterprise which would provide their organization with a steady flow of quality products.

Initially, respondent sold to the Ben Gross Corporation, the Capehart name, copyright, trademarks and good-will, its cabinet and radio plant, all machinery used by C-F in the manufacture of its radios, television sets and high-fidelity apparatus, model prototypes and plans, the "Capehart Art Collection", and a license to sell "Capehart" merchandise.

After the inventory was taken of C-F sets, parts and components, C-F transferred the inventory to the purchaser and the transaction was completed.

Respondent received as consideration for the sale of its entire C-F business, $3,504,120.94 and the assumption

by the purchaser of C-F's substantial outstanding warranty obligations. $2,585,723.93 of the purchase price was in payment of respondent's inventory.

Formal notices of termination of the regional merchandiser's agreements were sent to all regional merchandisers, noting that C-F had gone out of the home electronics business.

The Decisions Below

The District Court held that petitioners possessed "a rather usual form of sales agency in a limited designated territory" and were "to be compensated by commissions on orders which it procured" (App. 26a); and that petitioners were not a distributor who was to be compensated by way of profits upon resale of merchandise which it might purchase for its own account. Since petitioners' claim was that the "agreement obligat[ed] Capehart to give Rubinger-McAllister the right to purchase the inventory sold to Ben Gross, or to a first refusal on the same terms," and since their only claim to damages suffered was "by way of loss of profits on resale for the alleged breach of this obligation," (App., 31a) the trial judge properly dismissed the action.

The District Court also decided that petitioners' claim must be dismissed even if petitioners had in fact been entitled to make substantial purchases of merchandise for their own account. The Court found that the litigants had not contemplated that any rights which petitioners might have under the agreement would be infringed by a transaction of the extraordinary magnitude and character reflected in the sale of C-F's entire business.

The Court of Appeals, agreeing that petitioners were mere sales agents, affirmed, holding that "having no right to purchase, Rubinger-McAllister was not legally harmed by Capehart's failure to provide an opportunity to purchase." (Pet. App., 36)

ARGUMENT

I

Respondent did not owe to petitoners the contractual duty which forms the essential element of the asserted cause of action.

The District Court correctly construed the agreement between the parties as constituting petitioners a mere sales agent to whom respondent owed only the duty of exercising good faith in passing on orders solicited by such sales agent. The Court of Appeals affirmed the dismissal of the complaint because it agreed with the trial court that petitioners, having no right to purchase, could not have been harmed by not being permitted to purchase C-F's inventory.

Respondent submits that a reading of the agreement establishes, as found by both courts below, that petitioners' only right under the agreement was to solicit orders for acceptance by C-F and that the parties never intended that petitioners could make substantial purchases for resale to retail dealers.

As the Court of Appeals stated, the agreement carefully detailed the duties of a sales representative and the manufacturer. The Court noted that the agreement provided:

> "The merchandiser must maintain a showroom and a sales force; he must supervise; not provide, service facilities; he must seek out desirable retailers for Capehart's products. Commissions are specified. . . ." (Pet. App., 35)

It had also noted that petitioners agreed:

> "... to devote its best efforts 'to the promotion of the sale and use of Capehart products . . . and to the marketing thereof through retail dealers directly franchised by the Company'; to maintain and stock a showroom for the display of Capehart products; . . . to supervise retailers' service facilities; to solicit retailers and recommend them to Capehart for a franchise; and generally to assist Capehart in its local business." (Pet. App., 31)

It then noted that C-F, as a manufacturer-supplier, agreed to:

> ". . . make shipment on all orders received directly from retailers or transmitted by Rubinger-McAllister and accepted by Capehart subject to the usual exceptions for war, strikes, etc. It retained the right 'to allocate and allot its production, sales and shipments in such manner as it shall deem best'; in addition, it was privileged to 'make shipments in part or no shipment against any order of the Regional Merchandiser or of any franchised Retail Dealer within his territory.' Capehart was to pay Rubinger-McAllister a specified 'override' (commission) for all filled orders placed by retailers in the area." (Pet. App., 31-32)

As the Court of Appeals stated, the absence of any reference to a right to purchase merchandise for resale, or, for that matter, the right to purchase any merchandise for any purpose whatsoever, other than for samples, is "glaringly" apparent. If the parties had contemplated that petitioners would function as a distributor, purchasing, warehousing and reselling substantial quantities of merchandise (needed to satisfy the requirements of the New York area), as well as a sales agent, surely there would be set forth in the agreement the prices and terms of payment at which C-F merchandise could be purchased by the distributor.*

* Petitioners argue that the agreement did set forth the terms of payment at which the regional merchandiser would purchase C-F merchandise for resale:

> "The Regional Merchandiser's Agreement did contain terms of payment. It incorporated by reference the Direct Dealer Price Lists . . ."
>
> * * * * *
>
> "No one can explain the Court's failure to notice that terms of payment were incorporated in the Regional Merchandiser's Agreement because the Direct Dealers' Price Lists were submitted to the Court as Appeal Exhibit 10." (Petition, 20)

But even a cursory reading of the agreement reveals that the terms set forth in the direct dealer price lists refer to the payments to be made by the consumer-outlet dealers whose orders the regional merchandiser was to solicit in C-F's behalf.

Indeed, the agreement never refers to the parties as seller and buyer; make no mention of shipping terms, and says nothing about warehousing responsibilities.*

It is inconceivable that the parties intended that petitioners would function as a distributor and yet leave vital provisions governing their relationship to conjecture.**

The correctness of the conclusion reached by the Court of Appeals in affirming the trial court's determination that petitioners were a mere sales agent, is confirmed by the business background against which the parties contracted and the parties' own practical construction of the agreement.

The trial court found that early in 1956 C-F changed its system of marketing from using regional distributors, operating under its Distributor Franchise Agreement (Def. Ex. HH), to market its products, to appointing regional merchandisers operating under a standard sales agency agreement.

Petitioner McAllister was familiar with C-F's entire marketing system since 1939, having been employed for several years as C-F's Eastern Divisional Sales Manager

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* Throughout the period the regional merchandiser's agreement was in effect C-F maintained warehouses where its merchandise was kept on hand for direct shipment to retail dealers, pursuant to orders solicited by the regional merchandiser.

** Petitioners argue (Petition, 13) that the use of the term "regional merchandiser" proves that petitioners' assignor was a distributor entitled to buy for its own account and resell at a profit since, "[t]he ordinary dictionary meaning of 'merchandising' is 'to buy and *sell*' and carry on trade in some kind of goods." (Citing Webster's New World Dictionary of The American Language and New Standard Dictionary of the English Language; emphasis supplied by petitioners). This argument is hardly persuasive. Petitioners' own definition is in terms of "'trading in' goods," and surely a manufacturer's sales agent trades in goods as much as a distributor. It may be noted that The Oxford English Dictionary (Volume 6, page 346, 1933 ed.) defines "merchandising" as "the transaction of mercantile business; trafficking."

until at least March 8, 1956.* Petitioner Rubinger was equally well informed about C-F's system of marketing. He had been an officer of one of the Gross companies, in charge of its Stromberg-Carlson division, which distributed radio and television products in competition with C-F distributors.

In the light of this background, a comparison of the actual agreement between the parties, with the distributing contract formerly used by respondent, the Distributor Franchise Agreement (Def. Ex. HH) is most instructive. The latter, both in its heading and throughout its body, plainly refers to the franchisee as a "Distributor". It also minces no words in describing the precise characteristics of this relationship, for in paragraph 1(a) respondent agreed to "sell to Distributor, Capehart Radio, Phonograph-Radio and Television Products for the home . . . for resale to Distributor's franchised Capehart retail dealers. . . ."

This language, that manufacturer sells to the distributor for resale by the latter, is repeated throughout the remainder of the body of the agreement. (e.g., pars. 1(b), 6(b), 9) That this analysis is not based simply on isolated phrases of the contract is made clear by paragraph 18, which defines the relationship between the parties in unmistakable terms:

> "The relationship between Capehart and the Distributor is and during the life hereof shall be that of seller and buyer respectively. The Distributor, its agents and employees and Capehart, its agents and employees, shall under no circumstances be deemed agents or representatives of the other party."

Finally, it is important to note that the Distributor Franchise Agreement specifically provided that the dis-

* It is highly revealing that petitioner McAllister stated in answer to questions as to whether petitioners' assignor was regarded by him as a distributor:

"We were not considered as a distributor." (R. 1438)

tributor shall have the responsibility for warehouse maintenance and for servicing of the product (pars. 6(b), 11), functions which are typically performed by a distributor, as opposed to a mere sales agent, and which the trial court found were in fact performed by Dorfman-Endel, Inc., the distributor operating in New York until early 1956, (App. 19a) and which functions were not performed or required to be performed by petitioners under the merchandiser's agreement.

In view of the above circumstances, forming the business background against which the parties contracted and of which petitioners were aware, it is clear that the omission of the terms usually found in a distributorship agreement was not mere accident and that the parties intended the merchandiser to function as a salesman in contrast to a distributor.

Further confirming the determination made by the courts below is the practical construction given to the agreement by the parties themselves.

The record shows that in April of 1956, petitioners proceeded to solicit orders and collect payment from certain retail dealers at prices higher than those which respondent charged other retail dealers in the territory for like merchandise. These excessive prices were collected by petitioners by the device of effecting unauthorized releases of the merchandise from respondent's warehouse and then transmitting these dealer orders to respondent in petitioners' own name at the proper prices, with petitioners thereby pocketing the differential.

Petitioners argue that these sales, consummated in petitioners' name, confirm their theory that petitioners had the right to purchase substantial goods on their own account for resale as distributor under the contract. (Petition, 21, f.n.) Nothing, however, could be further from the truth. Respondent in the course of a regular check of warehouse receipts discovered the deception and sent protest communications to the warehouse and to petitioners

in April 1956, demanding that these unauthorized procedures must be stopped. The unrebutted evidence shows that thereafter petitioners acquiesced in this demand, made no protest, asserted no claim of right to buy C-F merchandise, and made no further purchases in their own name. These sales, including this sample merchandise, amounted to $3,996.45.

It is respectfully submitted that the foregoing establishes a course of conduct and a practical interpretation of the agreement which completely negates petitioners' belated claim that they had a right to buy and resell merchandise as did respondent's distributors. The evidence clearly shows that petitioners attempted to turn a limited privilege to buy display and accommodation items into an improper scheme in violation of their obligations under the agreement, and when respondent discovered these abuses and acted firmly to protect both its retail dealers and itself, petitioners made no protest and submitted no further orders in their own name, in obvious recognition of the fact that it had no such right as is now asserted by petitioners.

This, indeed, is not the only manner in which petitioners recognized their true function under the agreement.

In its 1956 Federal Income Tax Return, in addition to listing income of $381.28 representing "profits" on the above sales of $3,996.45, petitioners' assignor described itself as a "Manufacturers' Representative" in listing its income of $7,364.96 as "Commissions". (Def. Ex., JJJJ)

Moreover, the very order form which petitioners used to transmit to respondent the orders which it had solicited from dealers, provided:

> "All quotations made and all orders and contracts made and accepted by salesman or selling agent are subject to our [C-F's] approval. . . ." (Pl. Ex. 79)

In sum, that the parties intended the relationship contended for by petitioners is unthinkable in view of the lan-

guage of the March 8, 1956 agreement,* the subsequent dealings between the parties (including petitioners' acquiescence in C-F's demand that the profit-taking scheme cease), and the manner in which petitioners operated (without warehousing, servicing or possessing any of a distributor's responsibilities).

Furtnermore, if petitioners' interpretation of the contract is correct, there would exist the extraordinary situation of petitioners' assignor purchasing and selling at a profit for its own account the same C-F line of merchandise in the same territory in which at the same time it was operating as C-F's sales representative soliciting orders on a commission basis. The agent would then be in direct competition with his principal for the business of the retail dealers in the New York area. Such a marketing arrangement could only lead to chaos. That the parties contempated such an uncommercial situation is hardly conceivable.

Finally, as the trial court pointed out: Assuming *arguendo* that petitioners' assignor had in fact been entitled to make substantial purchases of merchandise for its own account, the parties did not contemplate that the right would be infringed by a transaction of the extraordinary magnitude and character reflected in the sale by respondent of its C-F division.

The trial court noted that C-F, at the time of the sale of its business to Gross, had eighteen other regional merchandisers in other sections of the country operating under similar agreements, as petitioners well knew. If petitioners

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* Indeed, on its face, the agreement makes the basic distinction between a "Regional Merchandiser" and the Company's "franchised distributor", which respondent was in the process of replacing territory by territory:

> "The Company hereby assigns to the Regional Merchandiser an exclusive franchise (subject to the same limitations as to certain small set radio sales and Company's direct sales rights as accepted by Company's franchised distributor . . .)" (Pl. Ex. 3; WITNESSETH Clause, page 1)

are correct that their right to purchase for their own account extended to the purchase of C-F's entire business, then it would follow that "by creating a system of regional merchandisers Capehart would have bound itself not to dispose of its entire business until it had given a first refusal to whatever regional merchandiser happened to have the territory in which a prospective purchaser was located." This, the court concluded, "would be a novel and unrealistic interpretation of a pattern of agreements setting up regional sales agencies on a national scale." (App. 29a)

Furthermore, it is clear that the parties did not contemplate that any right petitioners' assignor had to purchase for its own account would include the exclusive right to purchase C-F's inventory upon its liquidating its business. That any such right existed is negated by the provisions of the agreement which gave to C-F the "absolute right" to repurchase from the regional merchandiser any C-F merchandise remaining on hand at the agreement's termination, at the prices paid by the regional merchandiser, and to prohibit to it the use of the term "Capehart". (Pl. Ex. 3, pars. 10, 13)

Moreover, the trial court recognized "the agreement was terminable at will by either party on a mere ten days' notice," so that if C-F wished to discontinue its business by selling it to someone in its entirety, all it had to do was to exercise the right to terminate, which it did. (App. 27a-28a)

Thus, even assuming petitioners had some right to purchase for their own account, the parties could not have contemplated that such right would be infringed by C-F selling its entire business to a third party.

II

There is no conflict with applicable state law.

The decision below does not warrant review by this Court. The result reached by the District Court and a

unanimous Court of Appeals, turns wholly upon the interpretation of a particular contract between the parties and has no application to litigants other than the parties to the instant action.* The petition does not cite to the Court any authority which indicates that the courts of New York would not have dismissed the complaint, recognizing that the respondent did not owe to petitioners the contractual duty which forms the essential element of the asserted cause of action. There is no conflict nor need for further review and there is no question of federal law here involved.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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* Throughout the petition, petitioners claim that the opinions below are of commercial importance and in support of their vague claim refer to the "N. Y. Retail Daily" and "Professors of Law" in general, and Messrs. Farnsworth, Ronan and King in particular. Our research of legal periodicals discloses that the decisions below have not been the subject of any law review comment, note or article. Messrs. Farnsworth, Ronan and King were counsel to the appellants below, the petitioners herein. Finally, an examination of local telephone and business directories fails to disclose the existence of any trade paper known as "N. Y. Retail Daily".

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ANSWERING BRIEF FOR PETITIONERS.

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